Supreme Court, U.S.
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Nos. 99-603 and 99-960

In the Supreme Court of the United States

LEGAL SERVICES CORPORATION, PETITIONER

v.

CARMEN VELAZQUEZ, ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

CARMEN VELAZQUEZ, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Section 504(a) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-53, and subsequent appropriations statutes incorporating that provision, preclude entities that receive federal funds from the Legal Services Corporation (LSC) from "initiat[ing] legal representation or participat[ing] in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system." § 504(a)(16), 110 Stat. 1321-55. Section 504(a)(16) specifies that the provision should not be construed, however, "to preclude a recipient from representing an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation." *Ibid.*

The question presented is whether the statutory provision permitting recipients of LSC funds to represent individuals seeking relief from a welfare agency only if the relief sought would not amend or change existing law is facially invalid under the First Amendment.

PARTIES TO THE PROCEEDING

The United States intervened in the district court, was intervenor-appellee in the court of appeals, and is petitioner in *United States* v. *Velazquez*, No. 99-960. The Legal Services Corporation was a defendant in the district court, was appellee in the court of appeals, and is petitioner in *Legal Services Corp.* v. *Velazquez*, No. 99-603. The Court granted the petitions for a writ of certiorari in the two cases at the same time and consolidated the cases. 120 S. Ct. 1553 (2000).

The following parties were plaintiffs in the district court, were appellants in the court of appeals, and are respondents before this Court in both cases: Carmen Velazquez; WEP Workers Together!; Community Service Society of New York, Inc.; New York City Coalition to End Lead Poisoning; Centro Independiente de Trabajadores Agricolas, Inc.; Greater New York Labor-Religion Coalition; Farmworkers Legal Services of New York, Inc.; Peggy Earisman; Olive Karen Stamm; Jeanette Zelhof; Elisabeth Benjamin; Jill Ann Boskey; Lauren Shapiro; Andrew J. Connick; C. Virginia Fields; Guillermo Linares; Stanley Michels; Adam Clayton Powell, Jr. IV; Lawrence Seabrook; and Scott M. Stringer.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-50a)[1] is reported at 164 F.3d 757. The opinion of the district court (Pet. App. 51a-99a) is reported at 985 F. Supp. 323.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 1999. A petition for rehearing was denied on

[1] Pet. App. refers to the appendix to the petition for a writ of certiorari in *United States* v. *Velazquez*, No. 99-960.

July 8, 1999. The Legal Services Corporation filed a petition for a writ of certiorari on October 6, 1999. *Legal Servs. Corp.* v. *Velazquez*, No. 99-603. On September 28, 1999, Justice Ginsburg extended the time for the United States to file a petition for a writ of certiorari to and including November 5, 1999, and, on October 27, 1999, further extended the time to and including December 5, 1999 (a Sunday). The United States filed a petition for a writ of certiorari on December 6, 1999 (No. 99-960). On April 3, 2000, the Court granted the petitions for a writ of certiorari and consolidated the cases. 120 S. Ct. 1553. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. The First Amendment to the United States Constitution provides, in relevant part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Section 504(a) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-53, is set forth in relevant part at App., *infra*, 1a-9a.

The provisions in subsequent annual appropriations acts specifying that Section 504 shall continue to apply to recipients of funds from the Legal Services Corporation are set forth in relevant part at App., *infra*, 18a-25a.

3. The regulations promulgated by the Legal Services Corporation regarding program integrity requirements for its fund recipients and the implementation of

Section 504(a)(16), 45 C.F.R. 1610.8, 1639.1-1639.6, are set forth at App., *infra*, 26a- 30a.

STATEMENT

1. a. In 1974, Congress enacted the Legal Services Corporation Act (the LSC Act), Pub. L. No. 93-355, 88 Stat. 378, 42 U.S.C. 2996 *et seq.*, creating the Legal Services Corporation (LSC) as an independent, non-profit corporation to "provide financial assistance to qualified programs furnishing legal assistance to eligible clients." 42 U.S.C. 2996e(a)(1)(A). The Act authorizes LSC to make grants to, and to contract with, individuals, organizations, and (in certain limited circumstances) state and local governments, for the purpose of providing legal assistance to eligible clients. *Ibid.* LSC receives funds appropriated annually by Congress to provide such financial assistance. LSC then distributes those funds to programs, individuals, and other entities that have submitted applications describing their proposed legal services activities. 42 U.S.C. 2996b(a), 2996e(a). The LSC Act limits LSC financial support to "legal assistance in noncriminal proceedings or matters" for "persons financially unable to afford legal assistance." 42 U.S.C. 2996b(a).

From the outset, the LSC Act has prohibited fund recipients from, *inter alia*, making available any LSC funds, program personnel, or equipment to any political party, to any political campaign, or for use in "advocating or opposing any ballot measures." 42 U.S.C. 2996e(d)(3) and (4). The LSC Act also has prohibited the use of LSC funds to influence any governmental agency action or legislation, except upon request or when necessary to represent an eligible client. 42 U.S.C. 2996f(a)(5). And the LSC Act has prohibited the use of LSC funds to provide legal assistance with

regard to any proceedings relating to any nontherapeutic abortion, elementary or secondary school desegregation, military desertion, or violation of the selective service statute. 42 U.S.C. 2996f(b)(8)-(10) (1994 & Supp. III 1997). Finally, the LSC Act has, from the outset, prohibited LSC fund recipients from bringing any class action suits directly, or through others, unless express approval is obtained from the recipient's project director according to established policies. 42 U.S.C. 2996e(d)(5). Those restrictions in the LSC Act apply to recipients' activities supported by other federal funds or private funds, but not those supported by non-federal public funds or tribal funds. 42 U.S.C. 2996i(c).[2]

b. On April 26, 1996, at a time when proposals were before Congress to eliminate LSC because of controversy over certain activities pursued by some LSC fund recipients, Congress enacted a provision (Section 504) that expanded the scope of restrictions on the activities of LSC fund recipients. See Omnibus Consolidated Rescissions and Appropriations Act of 1996 (1996 Act), Pub. L. No. 104-134, § 504, 110 Stat. 1321-53. In each subsequent annual appropriations act, Congress has specified that Section 504 shall continue to apply to LSC fund recipients.[3]

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[2] The LSC Act vests LSC with the authority "to insure the compliance of recipients and their employees with the provisions of [the LSC Act] and the rules, regulations, and guidelines promulgated pursuant to [the LSC Act], and to terminate, after a hearing * * *, financial support to a recipient which fails to comply." 42 U.S.C. 2996e(b)(1)(A). The LSC Act also authorizes LSC to "issue rules and regulations to provide for the enforcement" of that and other requirements of the Act. 42 U.S.C. 2996e(b)(5); see also 42 U.S.C. 2996g(e).

[3] See Omnibus Consolidated Appropriations Act, 1997 (1997 Act), Pub. L. No. 104-208, § 502(a), 110 Stat. 3009-59; Departments

Section 504 precludes LSC fund recipients from representing certain parties in a variety of specified circumstances. Under Section 504(a)(16), which is at issue here, recipients may not "initiate[] legal representation or participate[] in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system." 1996 Act, § 504(a)(16), 110 Stat. 1321-55. That section further specifies, however, that it "shall not be construed to preclude a recipient from representing an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation." § 504(a)(16), 110 Stat. 1321-55 to 1321-56.

Other restrictions set forth in Section 504 provide, *inter alia*, that LSC fund recipients may not: advocate or oppose reapportionment of a legislative, judicial, or elective district, or participate in any litigation related thereto; attempt to influence the "issuance, amendment, or revocation of any executive order, regulation," or similar government promulgation; attempt "to influence any part of any adjudicatory proceeding of any Federal, State, or local agency" that is formulating general agency policy; attempt to influence "the passage or defeat of any legislation, constitutional amendment, referendum, initiative * * * of the Congress or a State or local legislative body"; initiate or participate in class-action lawsuits; represent aliens who are

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of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 502(a), 111 Stat. 2510; Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, Tit. V, 112 Stat. 2681-107; Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, Tit. V, 113 Stat. 1501A-49.

unlawfully present in the United States except in cases of domestic violence; conduct a training program "for the purpose of advocating a particular public policy or encouraging a political activity"; participate "in any litigation with respect to abortion"; "participate[] in any litigation on behalf of a person incarcerated in a Federal, State, or local prison"; or defend a person in a proceeding to evict the person from a public housing project if the person has been charged with engaging in illegal drug activity that threatens the health or safety of a tenant or employee of the housing agency. 1996 Act, § 504(a)(1), (2), (3), (4), (7), (11), (12), (14), (15) and (17); 110 Stat. 1321-53 to 1321-56; 1997 Act, § 502(a)(2)(C), 110 Stat. 3009-60. Those restrictions apply to all of the activities of an LSC fund recipient, including those paid for by non-LSC funds (except for tribal funds). 1996 Act, § 504(d)(1) and (2), 110 Stat. 1321-56.[4]

2. On December 2, 1996, LSC issued a final rule to "clarif[y] the extent to which conditions on a recipient's non-LSC funds apply when a recipient transfers its funds to another person or entity." 61 Fed. Reg. 63,749.[5] LSC noted that the statutes do not themselves address

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[4] LSC fund recipients may, however, use non-LSC funds "to comment on public rulemaking or to respond to [an unsolicited] written request for information or testimony from a Federal, State or local agency, legislative body, or committee," 1996 Act, § 504(e), 110 Stat. 1321-57, and "for the purpose of contacting, communicating with, or responding to a request from, a State or local government agency, a State or local legislative body or committee, or a member thereof, regarding funding for the recipient," 1996 Act, § 504(b), 110 Stat. 1321-56.

[5] LSC had published an interim rule on August 16, 1996, concerning that and other aspects of the restrictions. 61 Fed. Reg. 41,960.

how and to what extent the restrictions they impose should be applied with respect to funds that are transferred by a recipient to another entity. LSC explained, however, that it "has historically applied such provisions to transfers of a recipient's funds," and that that "policy reflects the intent of [LSC] that transfers of funds not become a means to circumvent statutory conditions on a recipient's LSC and non-LSC funds." *Id.* at 63,752.

The final rule differentiated between the transfer of LSC and non-LSC funds. With respect to transfers of LSC funds, the rule specified that the Section 504 prohibitions and requirements would generally "apply to both the LSC funds and the non-LSC funds of the entity" to which LSC funds were transferred. LSC explained that

> [t]his requirement is based on [LSC's] interpretation of legislative intent that the statutory conditions on LSC funds attach to a recipient's non-LSC funds and that, in most situations, this should also be the case when LSC funds are transferred by a recipient. Otherwise, recipients would be able to avoid legislative intent by simply transferring their LSC funds to other persons or entities.

61 Fed. Reg. at 63,752. In the case of a transfer of *non*-LSC funds, the prohibitions and requirements on the use of funds generally applied "to the funds transferred, but * * * not * * * to the other non-LSC funds" of the transferee. *Id.* at 63,753.

Another issue that LSC had to resolve was whether, and to what extent, the statutes' restrictions should apply to organizations that are "interrelated" with an LSC fund recipient. LSC made clear that the new restrictions on the use of LSC and non-LSC funds apply

to any "interrelated" organization just as if it were the recipient itself. J.A. 66-67. LSC previously had defined the term "interrelated organization" as an organization for which the LSC fund recipient determined "the direction of management and policies" or influenced the organization "to the extent that an arm's length transaction may not be achieved." 50 Fed. Reg. 49,279 (1985).

3. a. In January, 1997, a suit was brought against LSC in the United States District Court for the District of Hawaii. The plaintiffs contended, *inter alia*, that the 1996 and 1997 Acts and the implementing regulations were facially invalid under the First and Fifth Amendments to the extent they prevented LSC fund recipients from spending non-federal funds to pursue activities protected by the First Amendment. See *Legal Aid Soc'y of Haw.* v. *Legal Servs. Corp.*, 961 F. Supp. 1402 (D. Haw. 1997) (*LASH I*).

On February 14, 1997, the district court in *LASH I* entered a preliminary injunction against enforcement of certain of the restrictions, including Section 504(a)(16). It reasoned that Congress may restrict the use of funds in conjunction with a federally subsidized program only if adequate alternative channels exist whereby the grant recipients can pursue the unsubsidized activities. *LASH I*, 961 F. Supp. at 1408, 1412-1414 (citing *Rust* v. *Sullivan*, 500 U.S. 173 (1991); *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984); *Regan* v. *Taxation With Representation*, 461 U.S. 540 (1983)). The *LASH I* district court found that there was a fair likelihood that the plaintiffs could establish that LSC's regulations, and in particular LSC's interrelated-organization standard (see pp. 7-8, *supra*), did not allow a recipient to form an affiliate organization through which it could pursue restricted activities using non-LSC funds and,

therefore, did not provide alternative channels through which recipients could exercise their First Amendment rights. *Id.* at 1414-1417.

b. On March 14, 1997, following the decision in *LASH I*, LSC issued a new interim rule concerning the use of non-LSC funds by LSC fund recipients. 62 Fed. Reg. 12,101-12,104. The revisions were intended to "reinforce [LSC's] commitment to the statutory structure of prohibitions and restrictions intended by Congress, without risking the possible infringement of constitutional rights where the prohibited activities are supported entirely by non-LSC funds and carried out without subsidization by the LSC grantee." *Id.* at 12,101. LSC explained that the court's preliminary injunction in *LASH I* "was grounded in pertinent part on its understanding of [LSC's] interrelated organization policy." *Ibid.* In an effort to address the alleged constitutional infirmities, the new interim rule deleted the provisions on transfers of non-LSC funds and added a new section allowing LSC fund recipients "to have an affiliation or relationship" with a separate organization that engages in restricted activities with non-LSC funds so long as the relationship meets new standards of program integrity, even if the recipient and organization are interrelated—*i.e.*, even if the recipient controls, is controlled by, or shares common control with the other organization. *Id.* at 12,101-12,102.

c. On May 21, 1997, after receiving comments, LSC issued a new final rule. 62 Fed. Reg. 27,695. LSC noted that parts of its 1996 final rule remained unchanged, including the provision that, when a recipient transfers LSC funds, the restrictions regarding the use of funds generally apply both to the transferred LSC funds and to the non-LSC funds of the transferee. *Id.* at 27,696-27,697; see 61 Fed. Reg. at 63,752. At the same time,

however, LSC confirmed its deletion (as set forth in the March 14, 1997, interim rule) of the provision concerning an LSC fund recipient's transfer of *non*-LSC funds, noting that "[t]here is no statutory provision requiring that a transfer of non-LSC funds be subject to LSC restrictions." 62 Fed. Reg. 27,697.

The new final rule revised the program-integrity standards to delete entirely the provisions regarding interrelated organizations and to provide "guidance regarding a recipient's relationship with any organization, independent or affiliated, that engages in restricted activities." 62 Fed. Reg. at 27,697. The new final rule provides that an LSC fund recipient must have an objective integrity and independence from any organization that engages in restricted activities, and in particular that three requirements must be satisfied: (1) the other organization must be a separate legal entity; (2) the other organization must not receive LSC funds directly or through any transfer, and no LSC funds may subsidize restricted activities; and (3) the LSC fund recipient must maintain a physical and financial separation from the other organization. The last factor is to be applied based on the totality of circumstances, including the existence of separate personnel, accounting and timekeeping records, the degree of separation of facilities, and the extent to which the entities are distinguished from each other by signs or other indicia. *Id.* at 27,698, 27,700; 45 C.F.R. 1610.8(a)(3)(i)-(iv). LSC noted that "because the standards will allow control at the Board level, recipients will have an avenue through which to engage in restricted activities as long as they comply with the program integrity standards." 62 Fed. Reg. at 27,697. LSC noted that the program-integrity standards were fashioned after those found to be constitutional in *Rust*

v. *Sullivan*, 500 U.S. 173 (1991). 62 Fed. Reg. at 27,697.[6]

d. On June 5, 1997, LSC adopted final regulations clarifying the provisions of Section 504(a)(16). 62 Fed. Reg. 30,766. The regulations interpreted the statutory phrase "an effort to reform a Federal or State welfare system," to include "all of the provisions, except for the Child Support Enforcement provisions of Title III, of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, * * * 110 Stat. 2105 (1996), and subsequent legislation enacted by Congress or the States to implement, replace or modify key components" of that Act, and legislation enacted "by States to replace or modify key components of their General Assistance or similar means-tested programs." 45 C.F.R. 1639.2(a); see App., *infra*, 28a. In addition, the regulations defined the statutory term "existing law" to

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[6] LSC rejected arguments that separate bookkeeping should be sufficient for there to be a permissible relationship between a recipient and an organization that engages in restricted activities because LSC explained that "such a situation would violate the Congressional requirement that entities it funds not engage in restricted activities." 62 Fed. Reg. at 27,698. Rather, "determinations taking into account the physical and financial separation standards must ensure that there is no identification of the recipient with restricted activities and that the other organization is not so closely identified with the recipient that there might be confusion or misunderstanding about the recipient's involvement with or endorsement of prohibited activities." *Ibid.*; see also *id.* at 12,102.

LSC also emphasized that, "consistent with [LSC's] longstanding practice regarding compliance issues, individual recipients are welcome to submit all the relevant 'program integrity' information and request a review by [LSC] of any existing or contemplated relationship with an organization that engages in restricted activities." 62 Fed. Reg. at 27,698.

mean "Federal, State or local statutory laws or ordinances which are enacted as an effort to reform a Federal or State welfare system and regulations issued pursuant thereto." 62 Fed. Reg. at 30,766; 45 C.F.R. 1639.2(b).

4. Respondents filed the instant suit in the United States District Court for the Eastern District of New York on January 14, 1997. Respondents are certain lawyers employed by LSC fund recipients, their indigent clients, and various contributors to LSC fund recipients. They alleged that the restrictions on the use of LSC and non-LSC funds by LSC fund recipients violated a variety of federal constitutional provisions. The United States intervened pursuant to 28 U.S.C. 2403(a) to defend the constitutionality of the restrictions. C.A. App. 437, 504.

On March 21, 1997 (before the new final rule was issued by LSC on May 27, 1997), respondents moved for class certification and a preliminary injunction, seeking to prevent LSC from imposing any sanctions on anyone based on the use of non-LSC funds by LSC fund recipients to engage in certain activities, including "to challenge the constitutionality of welfare statutes" or "to challenge the legality of welfare regulations or statutes." C.A. App. 129-130. On December 22, 1997 (after LSC issued its new final rule), the district court denied respondents' motion for a preliminary injunction.[7] The court concluded that respondents had failed

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[7] On August 1, 1997, the district court in the *LASH* litigation entered an order granting summary judgment to LSC and the United States. *Legal Aid Soc'y of Haw.* v. *Legal Servs. Corp.*, 981 F. Supp. 1288, 1301 (D. Haw.) (*LASH II*). On May 18, 1998, the Ninth Circuit affirmed in relevant part. *Legal Aid Soc'y of Haw.* v. *Legal Servs. Corp.*, 145 F.3d 1017 (*LASH III*), cert. denied, 525 U.S. 1015 (1998).

to establish a probability of success on the merits. Pet. App. 53a-54a. The court held, following *Rust* v. *Sullivan*, 500 U.S. 173 (1991), that LSC's final regulations leave open adequate alternative channels through which LSC fund recipients may engage in otherwise prohibited activities, because the regulations allow recipients to create and control affiliate organizations that engage in such activities. The court found that LSC's regulations requiring separation between LSC fund recipients and their affiliates are consistent with the statutory funding restrictions, Pet. App. 83a-88a, and that LSC's program-integrity requirements are appropriately tailored to serve the government's interest in preventing the appearance that the government is endorsing activities that Congress does not wish to fund. *Id.* at 88a-94a.

Respondents sought to distinguish *Rust* (which concerned regulations that precluded programs receiving federal funding for family-planning services from engaging in abortion counseling, referral, and activities advocating abortion as a method of family planning) on the grounds that *Rust* did not involve a lawyer-client relationship. Pet. App. 95a-98a. The court rejected that argument because, while the lawyer-client relationship implicates First Amendment values, "the restrictions pertaining to LSC fund recipients do not significantly impinge on the lawyer-client relationship." *Id.* at 97a. The court noted in this regard that the LSC regulations "broadly promote the lawyer-client relationship by providing that the lawyer may counsel the client, refer the client to another attorney, and explain to the client that LSC restrictions preclude the lawyer

from engaging in the activity the client may wish to undertake." *Id.* at 98a.[8]

5. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-50a.

a. The court first rejected respondents' argument that LSC's final regulations (allowing recipients to create affiliated organizations to engage in activities that are prohibited to recipients or transferees of LSC funds) are not based on a reasonable interpretation of the 1996 Act and that, without the regulations, the statutory provisions are unconstitutional because they do not leave open adequate alternative channels for expressive activities. See Pet. App. 12a-14a. The court noted that LSC's regulations are entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The court then emphasized that the 1996 Act does not address whether a recipient's transfer of non-LSC funds to an affiliate and the affiliate's use of those funds for a restricted activity constitutes an expenditure by a recipient under the Act. Pet. App. 13a-14a. The court concluded that LSC's final regulations allowing such arrangements

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[8] The district court rejected respondents' "rather casual due process and equal protection claims." Pet. App. 98a. The due process claim failed "for the same reasons the analogous claim failed in *Rust* – namely, because plaintiffs are not absolutely precluded from engaging in prohibited activities and, furthermore, have no constitutional entitlement to the benefits provided by the legal services program." *Ibid.* The equal protection claim failed because "the Government had a rational basis for restricting the activities of recipients, and because poverty is not a suspect classification." *Ibid.*

rest on a permissible construction of the Act and, therefore, are valid under *Chevron*. *Id.* at 12a-14a.[9]

The court also held that LSC's program-integrity regulations, which are designed to ensure the independence of an affiliated organization from the LSC fund recipient, do not impose "unconstitutional conditions" on the recipient of LSC funds by unreasonably burdening a recipient's use of nonfederal funds to engage in activity protected by the First Amendment. Pet. App. 17a-23a. The court found that the existence of adequate alternative avenues for engaging in restricted activities through affiliates is sufficient to satisfy First Amendment scrutiny. *Id.* at 17a-21a (discussing *Taxation With Representation*, *League of Women Voters*, and *Rust*). The court further held that respondents' allegations that the program-integrity regulations are unduly burdensome and inadequately justified were insufficient to sustain their facial challenge to those regulations. *Id.* at 22a-23a. The court noted, however, that LSC fund recipients remain free to bring as-applied challenges to the program-integrity rules. *Id.* at 23a.

The court rejected respondents' claim that certain restrictions on the use of non-LSC funds, including the welfare reform provision, impermissibly encroach on the relationship between lawyer and client. Pet. App. 15a-17a. The court pointed out that this Court had observed in *Rust* that "[i]t could be argued * * * that traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when

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[9] The court also expressed reluctance to accept respondents' statutory interpretation because of "the rule favoring an interpretation of a statute that preserves its constitutionality." Pet. App. 14a.

subsidized by the Government." *Id.* at 15a (quoting *Rust*, 500 U.S. at 200). The Court in *Rust* did not address that argument, however, because it found that the doctor-patient relationship established under the program at issue was not "sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice." *Ibid.* Similarly here, the court of appeals reasoned that, even assuming "that an 'all-encompassing' lawyer-client relationship enjoys heightened protection from government regulation, the lawyer-client relationships funded by LSC are no more 'all-encompassing' than the doctor-patient relationships * * * which were considered in *Rust*." *Id.* at 16a. The court of appeals noted that the LSC Act has always limited the range of services available through LSC grantees (see pp. 3-4, *supra*) and that grantees have historically limited their representation to selected issues and are "typically 'able to meet only a fraction of the demand for their services.'" *Ibid.* (quoting *Overview of LSC* at 4 (1996) (http://Hsi.nes/lsc/about.html)). The court also noted that because LSC-funded lawyers are bound to explain the restrictions to potential and actual clients, and are able to refer clients to lawyers who are not subject to such restrictions, there is no reason to fear that clients will detrimentally rely on LSC-funded lawyers for a full range of legal services. *Ibid.*

The court of appeals rejected respondents' claims of impermissible viewpoint discrimination with respect to the general restrictions on lobbying of legislative bodies (§ 504(a)(4), 110 Stat. 1321-53); attempting to influence the issuance, amendment, or revocation of executive orders, or regulations, or statements of general applicability by any federal, state, or local agency (§ 504(a)(2), 110 Stat. 1321-53); and attempting to

influence any part of an adjudicatory proceeding of any federal, state, or local agency that is designed for the formulation or modification of any agency policy of general applicability (§ 504(a)(3), 110 Stat. 1321-53). Pet. App. 23a-25a. The court held that those restrictions are "based on subject matter, not viewpoint," and merely prohibit fund recipients from engaging in activities outside the scope of the program. *Id.* at 24a.

Finally, with regard to the parallel restriction in Section 504(a)(16), the court similarly upheld as viewpoint neutral the general prohibitions against an LSC fund recipient initiating legal representation or otherwise participating in litigation, lobbying, or rulemaking "involving an effort to reform a Federal or State welfare system," because those prohibitions can be read as prohibiting activity that either supports or opposes welfare reform. Pet. App. 25a-28a. The court invalidated, however, as impermissible viewpoint discrimination, the proviso to Section 504(a)(16) that allows individual representation of a client seeking specific relief from a welfare agency, but only if the relief does not involve an effort to amend or otherwise challenge existing law. *Id.* at 28a.

The court acknowledged that in *Rust* this Court stated that "the Government has not discriminated on the basis of viewpoint" when "it has merely chosen to fund one activity to the exclusion of the other," Pet. App. 30a, and that those words from *Rust* "seem on their face" to support the dissenting view of Judge Jacobs, who would have sustained the provision. *Id.* at 31a. The majority stated, however, that it "doubt[ed] these words can reliably be taken at face value." *Ibid.* The court thought it "inconceivable that the Supreme Court that approved the *Rust* regulation would have intended its language to authorize grants funding

support for, but barring criticism of, governmental policy." *Id.* at 32a. The court distinguished *Rust* and *National Endowment for the Arts* v. *Finley*, 524 U.S. 569 (1998), on the ground that, in its view, a lawyer's argument that a statute or rule is unconstitutional or otherwise illegal "falls far closer to the First Amendment's most protected categories of speech than abortion counseling or indecent art," and that the welfare proviso represents an attempt to drive ideas from the "marketplace" of the courtroom. Pet. App. 33a-34a.

The court of appeals directed the district court to enter a preliminary injunction barring enforcement of the proviso against an LSC fund recipient representing individual clients who seek relief that would involve amendment or invalidation of existing law. Pet. App. 37a. The court thereby effectively broadened the provision allowing representation in individual welfare cases to extend the clause to *all* cases where an individual client seeks specific relief from a welfare agency. *Id.* at 38a.

b. Judge Jacobs concurred in the majority's decision insofar as it sustained the funding restrictions, but dissented insofar as it struck down the proviso in Section 504(a)(16). Pet. App. 38a-50a. In Judge Jacobs' view, this case falls within the teaching of *Rust* because the LSC Act as a whole funds a program that provides certain services and the proviso to Section 504(a)(16) merely prohibits LSC fund recipients from "rendering services that fall outside the scope of the program." *Id.* at 44a; see also *id.* at 40a, 46a-47a. He did not view as controlling this Court's decision in *Rosenberger* v. *Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), cited by the majority (Pet. App. 29a-30a), because an LSC fund recipient "is not a public forum or the participant in a public forum in which it is invited to

contribute its point of view; it is a contractor furnishing services that the government wants provided, and in that way it resembles the recipients of Title X funds in *Rust*, and any of the private agencies that carry out myriad other government programs that have limited and specified purposes." *Id.* at 40a.

Judge Jacobs emphasized that the invalidated proviso does not disfavor the speech of clients, because the limitation applies regardless of the ground on which the client seeks relief that would amend or invalidate existing law. He also emphasized that "[t]he majority has not successfully identified a disfavored viewpoint of any person in any public forum. To the extent that this legislation funds a 'viewpoint' at all, it is one that advocates the delivery of welfare benefits to claimants." Pet. App. 39a.

SUMMARY OF ARGUMENT

Section 504(a)(16) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-55, prohibits representation by LSC fund recipients of an individual seeking relief from a welfare agency, if the relief sought involves an effort to amend or otherwise challenge existing welfare law. Thus, the proviso identifies a category of cases in which LSC fund recipients may not provide legal representation—cases in which the relief sought includes an effort to amend or otherwise challenge existing welfare law. That limitation on the LSC program does not constitute impermissible viewpoint discrimination. The Section 504(a)(16) proviso is part of a generally applicable and permissible limitation on a federal program and furthers implementation of welfare programs by providing LSC-funded legal representation to individuals who have been wrongly denied

benefits the government intended for them to receive under the welfare programs. The fact that Congress did not also establish an LSC program to fund challenges to the welfare programs themselves does not make the LSC program it did fund an unconstitutional exercise in viewpoint discrimination. As this Court made clear in *Rust* v. *Sullivan*, 500 U.S. 173, 193 (1991), "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other."

That is particularly true in the present setting because an LSC fund recipient is free fully to explain to any individual seeking representation why it cannot accept representation, and it may freely refer the individual to any other attorney, a pro bono project, or any non-LSC funded office. Attorneys employed by LSC fund recipients are free to express their own views regarding any legal matter—including offering the view that a welfare provision is unlawful or unconstitutional—and to refer individuals to an attorney who will represent them in litigation that attorneys employed by the LSC fund recipient may not conduct themselves. Thus, the Section 504(a)(16) proviso is not aimed at the suppression of dangerous ideas or driving certain ideas from the marketplace. Recipients and their employees remain free to communicate whatever message they desire to the public, or to their clients, or to individuals who seek representation; and their actual or potential clients remain free to engage in whatever activities they desire, including administrative proceed-

ings or litigation to amend or challenge existing welfare law, albeit without federally funded legal representation. As in *National Endowment for the Arts* v. *Finley*, 524 U.S. 569 (1998), Congress chose to allocate the limited resources of a funding program in a manner that takes into account the nature of the activities of the applicants. It may constitutionally do so for a wide variety of reasons, *id.* at 585, 587-588, including to target federal funding of legal representation for individuals improperly denied welfare benefits under existing law, but not for those who are not eligible under existing law.

The court of appeals also erred in applying what appears to be a public forum analysis, in reliance upon this Court's decision in *Rosenberger* v. *Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995). Unlike the program at issue in *Rosenberger*, the LSC program is not dedicated to the promotion of diverse private expression in a public forum; it exists to subsidize certain discrete legal representation. The Ninth Circuit made this clear in *Legal Aid Society of Hawaii* v. *Legal Services Corp.*, 145 F.3d 1017 (*LASH III*), cert. denied, 525 U.S. 1015 (1998), where the court rejected the contention that *Rosenberger* undermines the validity of the LSC limitations.

ARGUMENT

THE PROVISION IN SECTION 504(a)(16), PERMITTING REPRESENTATION BY LSC FUND RECIPIENTS OF INDIVIDUALS SEEKING RELIEF FROM A WELFARE AGENCY ONLY IF THE RELIEF SOUGHT WOULD NOT AMEND OR CHANGE EXISTING LAW, IS CONSISTENT WITH THE FIRST AMENDMENT.

A. Section 504(a)(16) Imposes A Reasonable Limitation Of General Applicability On The Types Of Legal Representation Or Other Activities That An LSC Fund Recipient May Undertake

1. Section 504(a)(16) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-55, identifies a category of cases in which LSC fund recipients may not participate. It first sets forth a general prohibition against LSC fund recipients initiating any "legal representation or participat[ing] in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system." The court of appeals sustained that general restriction. Pet. App. 25a-28a.

Section 504(a)(16) then continues by providing a rule of construction, which states that the general prohibition "shall not be construed to preclude a recipient from representing an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation." § 504(a)(16), 110 Stat. 1321-55 to 1321-56. The final clause in that rule of construction—the proviso beginning with "if such relief"—serves to ensure that the general prohibition in the beginning of

Section 504(a)(16) against participating in efforts to reform a welfare system remains applicable even in a situation in which the LSC fund recipient is asked to represent an individual who seeks relief from a welfare agency.[10] Thus, under Section 504(a)(16), an LSC fund recipient may represent an individual who is seeking to obtain benefits *under* an existing welfare system, but not one who is seeking to *change* that existing system. Consequently, if an individual is seeking relief that would involve an amendment of or a challenge to existing welfare law and requests representation by an LSC fund recipient, the LSC fund recipient must decline the representation. The LSC fund recipient is free, however, to provide full information to the individual about the reasons for declining the representation and may refer the individual to any other attorney, a pro bono project, or any non-LSC funded office.[11]

Respondents repeatedly mischaracterize the proviso when they describe it as a prohibition against an LSC-funded attorney making particular arguments on behalf

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[10] As noted above (see pp. 11-12, *supra*), LSC's regulations define "existing law" to mean certain federal, state or local welfare statutes, regulations and ordinances. 45 C.F.R. 1639.2(b).

[11] As we explained at pages 10-11, *supra*, the LSC statutory and regulatory framework also allows LSC fund recipients to establish affiliated organizations that engage in restricted activities, so long as the LSC program-integrity standards are met. The court of appeals held that this framework, on its face, allows respondents adequate alternative channels for protected expression and defeats respondents' "unconstitutional conditions" argument. Pet. App. 17a-23a. Respondents seek review of that ruling in their petition in No. 99-604, *Velazquez* v. *Legal Services Corp.* The Court did not grant that petition when it accepted review in these cases. The court of appeals' ruling is correct, and further review by this Court is not warranted for the reasons set forth in our brief in opposition to that petition. 99-604 U.S. Br. in Opp. 12-18.

of a client in the course of litigation. See 99-603 Br. in Opp. 6, 10, 12, 18, 19; 99-960 Br. in Opp. 9-10, 11. As the dissent below recognized, "[t]he proviso on welfare litigation is not * * * an effort to weed out a certain class of arguments in cases in which LSC-funded lawyers appear. The statute nowhere contemplates or requires that an LSC-funded lawyer appear in a case in which he or she must forbear from challenging a welfare statute on meritorious constitutional grounds; to the contrary, the proviso says that a lawyer or grantee may not take on such a representation in the first place." Pet. App. 42a (Jacobs, J., dissenting in part).[12]

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[12] To the extent respondents speculate about ethical issues that an LSC-funded attorney might face in a particular case if a situation covered by the proviso arose in the midst of litigation (see 99-960 Br. in Opp. 9-10), those issues cannot properly be considered in the context of the instant case, which presents a facial challenge. Those issues involve as-applied hypotheticals. See *Finley*, 524 U.S. at 584 (noting the Court's reluctance to invalidate a statute based on hypothetical applications not before the Court). Moreover, respondents' contention that a general exception should be carved out of Section 504(a)(16) to allow representation by LSC fund recipients generally, notwithstanding the proviso, because of ethical issues that might arise in a particular case does not constitute an alternative basis for affirmance, as respondents claim. See 99-603 Br. in Opp. 9-11; 99-960 Br. in Opp. 9-10. Rather, such a construction of Section 504(a)(16) would require reversal of the court of appeals' judgment because it would confirm that Section 504(a)(16) is not vulnerable to a facial attack.

In any event, respondents' arguments are based on a misunderstanding of the applicable ethical standards. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 96-399 (1996) (providing detailed analysis of a variety of ethical issues arising out of LSC restrictions and emphasizing, *inter alia*, that: certain representations cannot be undertaken at all; cases in which issues could arise mid-litigation should be avoided or back-up non-LSC

The Section 504(a)(16) proviso serves to ensure that LSC fund recipients use limited financial resources to provide assistance to individual eligible clients who are entitled to benefits under existing welfare law, but need legal representation to obtain them in administrative proceedings before a welfare agency or through an action in court. At the same time, by prohibiting LSC fund recipients from pursuing matters that involve efforts to amend or challenge existing welfare laws, Section 504(a)(16) directs LSC-funded efforts away from representation that is more complex, and more likely to be time-consuming and expensive, than the straightforward erroneous-denial-of-benefits case. The Section 504(a)(16) proviso thus serves to channel money to "the administration of a complex existing statute so that everyone can get what the statute provides." Pet. App. 48a (Jacobs, J., dissenting in part). It excludes expensive constitutional litigation and statutory challenges and "maximizes the expenditure of limited available funds for less expensive benefit-collection lawsuits." *Id.* at 50a. Indeed, the more complex cases involving constitutional challenges or other efforts to amend welfare laws are more likely to be high-profile cases and may be more attractive to pro bono programs or projects supported by private funds.

2. These evident purposes of the funding restriction are confirmed by the legislative history of Section 504.

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counsel should be arranged from the outset; and, in certain other situations, cases might have to be transferred to non-LSC lawyers or a separate organization may be created to represent clients not eligible for LSC representation).

The House Report, for example, explained with respect to the funding restrictions generally:

> It is both the right and the responsibility of the Congress to decide what programs and activities will be supported by Federal funds. Therefore, the Committee has included numerous terms and conditions which target scarce resources to programs whose mission is to provide basic legal assistance to the poor.

H.R. Rep. No. 196, 104th Cong., 1st Sess. 119-120 (1995).

Similarly, Senator Dole (in the course of advocating a program of block grants to the States) commented on a report that those engaged in furnishing legal services for the poor had moved away from helping individual clients toward conceiving of their task as the representation of the poor as a group. He expressed concern that, "despite many dedicated lawyers who have undoubtedly helped poor clients through Legal Services grants, the inevitable result of this shift in focus has been to hurt those whom the Corporation was created to help. The impoverished individual who has run-of-the-mill, but important, legal needs is shunted aside by Legal Services lawyers in search of sexy issues and deep pockets." 141 Cong. Rec. 27,020 (1995); see also *id.* at 27,001 (Sen. Domenici) (suing States over welfare reform should not be done by legal services, but rather "they should leave that to somebody else"; "this program ought to be for the individual poor people who have a need for a lawyer"); *id.* at 26,819 (Sen. Gramm) (individuals have a right to file a lawsuit to challenge the constitutionality of a state welfare law, but "they ought not to use taxpayers' money to do it"); 119 Cong. Rec. 20,688 (1973) (Rep. Biester) (commenting on the

original LSC Act) (LSC fund recipients should provide individual representation to those who most need it and should not be "spending their time reforming laws they find discriminatory against the poor through class action and test-case litigation").

Section 504(a)(16) furthers those congressional purposes by precluding an LSC fund recipient from becoming involved in litigation, rulemaking, or similar proceedings that seek to amend or challenge existing welfare laws, and thereby diverting resources and efforts away from helping individual clients who were erroneously denied benefits. The application of the proviso to an LSC fund recipient's use of non-LSC funds is important to that objective. Because of the fungibility of money, a limitation on the use of non-LSC funds is appropriate to prevent LSC funds from subsidizing what Congress chose not to fund. As the district court (and a 1996 Senate Report concerning a subsequent authorization bill) explained:

> First, many legal services grantees currently receive funds from both public and private sources. Since the money is basically fungible, it would be difficult if not impossible to place restrictions only on the Federal funds. Second, the public cannot differentiate between LSC advocacy subsidized with public versus private funds. As a result, the public grows weary of watching LSC attorneys lobby legislators—even if that dismay might sometimes be misplaced.

Pet. App. 86a-87a (quoting S. Rep. No. 392, 104th Cong., 2d Sess. 7 (1996)).

B. Section 504(a)(16) Is Not Based On Impermissible Viewpoint Discrimination

1. The court of appeals declined to recognize the Section 504(a)(16) proviso as part of a framework of generally applicable and permissible limitations on the federal program that Congress chose to establish and fund. The court of appeals instead regarded Section 504(a)(16) as based on unconstitutional viewpoint discrimination. That was error. Congress included the rule of construction permitting representation in connection with individual benefit claims in Section 504(a)(16) to further the implementation of welfare programs by providing LSC legal representation to individuals who have been wrongly denied benefits that the government intended for them to receive under those programs. The fact that Congress at the same time enacted a general prohibition against LSC fund recipients participating in litigation, lobbying, or rulemaking involving an effort to reform a welfare system simply means that Congress did not also establish a program to fund challenges to the welfare programs themselves. That judgment by Congress does not render the program it *did* fund an unconstitutional exercise in viewpoint discrimination.

As the dissent below pointed out, the LSC program that Congress tailored in this way is similar to a hypothetical program in which the federal government provides funds to a contractor to provide middle-class taxpayers with representation by tax lawyers and advice from accountants in connection with determining how much tax they owe. A proviso that limited the federally funded assistance by lawyers to obtaining the proper amount due under the present tax code, but prohibited those lawyers from taking on cases aimed at

tax reform or other efforts to reform or challenge the tax system, would not make the program impermissibly viewpoint-based. See Pet. App. 48a. Like Section 504(a)(16), it would merely ensure that the program operated within its intended limits (to assist people in getting what they were owed under existing law).

Congress's choice of the limits of the program may leave some needy individuals without the ability to obtain legal assistance from an LSC fund recipient in some agency or judicial proceedings. That, however, is the natural consequence of every choice Congress makes about the use of funds by organizations that receive federal funds under the LSC Act. Indeed, the court below, in the course of rejecting another of respondents' claims, emphasized that LSC fund recipients "have historically limited their representations to selected issues, and are typically 'able to meet only a fraction of the demand for their services.'" Pet. App. 16a (citation omitted). And, as Judge Jacobs pointed out in dissent, "[t]here is nothing remarkable about this. Lawyers often turn down representations that they cannot fulfill, either by reason of conflict or otherwise (such as availability of time and resources, or lack of expertise)." *Id.* at 42a-43a. The fact that Congress chose one means and not another to address a particular set of problems does not render the program it established impermissibly viewpoint based. It certainly cannot mean that the federal statute is susceptible to facial constitutional invalidation—relief that is "'manifestly, strong medicine' that 'has been employed by the Court sparingly and only as a last resort.'" *Finley*, 524 U.S. at 580 (quoting *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973)).

This Court has made clear that "[t]he Government can, without violating the Constitution, selectively fund

a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other." *Rust* v. *Sullivan*, 500 U.S. 173, 193 (1991). That is particularly true in the present setting, since the LSC fund recipient may exercise First Amendment rights through other channels. See note 11, *supra*.

In *Rust*, the petitioners made an argument almost identical to respondents' argument here, contending that a program funding family-planning services discriminated on the basis of viewpoint because it allowed speech discussing some viewpoints (those favoring certain family planning options) while prohibiting competing viewpoints (those favoring abortion as a method of family planning). 500 U.S. at 192. This Court expressly rejected that argument, holding, as set forth above, that Congress may choose to fund one program and not another and that such a choice does not constitute impermissible viewpoint discrimination. *Id.* at 193. Thus, *Rust* was "not a case of the Government 'suppressing a dangerous idea,' but of a prohibition on a project grantee or its employees from engaging in activities outside the project's scope." *Id.* at 194; accord *Finley*, 524 U.S. at 587-588.

The same is true here. As in *Rust*, Congress has chosen to fund a certain program to the exclusion of another. Congress has chosen to fund representation in administrative or judicial proceedings in which individuals seek to establish their entitlement to benefits *under* a current welfare program (which is itself funded by the government), but not to fund representation in such proceedings in which individuals would ask the

agency to amend or the court to invalidate that very program in some respect. In that way, Congress has sought to maximize the availability of funds to pay for legal assistance that will enhance the value of the current welfare program to its intended beneficiaries by providing assistance to persons who believe they were wrongfully denied the benefits that the program, as currently constituted, makes available.

Attorneys employed by LSC fund recipients who are asked to represent other individuals, whose entitlement to welfare benefits would depend on revision or invalidation of the current welfare program in some respect, are free to inform those individuals that such representation is beyond the scope of the LSC program and to refer the individuals concerned to legal counsel outside the program, including any lawyer employed by an affiliated organization that the LSC fund recipient may have established in conformity with the LSC regulations. See p. 16, *supra*. The LSC program is thereby *less* restrictive than the program upheld in *Rust*, which prohibited physicians and other fund-recipient personnel from "referring a pregnant woman to an abortion provider, even upon specific request," and from providing any counseling about abortion. 500 U.S. at 180. Attorneys employed by LSC fund recipients are free to express their views, to actual or potential clients or anyone else, regarding any legal matter—including offering the view that a welfare provision is unlawful or unconstitutional—and to refer individuals to an attorney who will represent them in litigation that attorneys employed by the LSC fund recipient may not conduct themselves.

Thus, the Section 504(a)(16) proviso is not aimed at the suppression of dangerous ideas or driving certain ideas from the marketplace. See *Finley*, 524 U.S. at

585-587. Recipients and their employees remain free to communicate whatever message they desire to the public, to their clients, or to individuals who seek representation; and their actual or potential clients remain free to engage in whatever activities they desire, including administrative proceedings or litigation to amend or challenge existing welfare law, albeit without federally funded legal representation. As in *Finley*, Congress chose to allocate the limited resources of a federally funded program in a manner that takes into account the nature of the activities of the applicants. It may do so constitutionally for a wide variety of reasons, *id.* at 585, 587-588, including to target federal funding of legal representation for individuals improperly denied welfare benefits under existing law, but not for those who are not eligible under existing law. That choice by Congress is as valid as are all the other choices Congress has made from the outset of the LSC program in 1974 to specify the types of legal representation that are covered by the program and the types that are beyond its scope. Congress never intended for LSC attorneys to provide comprehensive legal services to their clients; Congress intended for them to furnish the types of legal services that it believed best served the public interest, and Congress does not act unconstitutionally when it specifies those services in legislation.

2. The court of appeals attempted to distinguish this case from *Rust* and *Finley* on the rationale that this case involves restrictions on speech that is critical of the government, which the court regarded as more protected by the First Amendment than abortion counseling or indecent art. But that rationale was based on the court of appeals' erroneous construction of the Section 504(a)(16) proviso as preventing LSC-funded lawyers from making certain arguments during the

course of legal representation. See Pet. App. 33a-34a. As discussed above, the Section 504(a)(16) proviso prevents LSC fund recipients from engaging in representation at all if a case involves a request for a particular form of relief—namely, amendment or invalidation of a welfare statute or regulation. See *id.* at 42a-43a (Jacobs, J., dissenting in part). Thus, the proviso does not exclude certain viewpoints in the course of litigating a particular case; it excludes a certain class of cases from the scope of the program altogether, in order to ensure that the program focuses on the day-to-day legal problems of poor people who are attempting to obtain benefits to which they claim entitlement under existing welfare programs.[13]

The court of appeals also erred in applying what appears to be a public forum analysis, in reliance upon this Court's decision in *Rosenberger*. The program at issue in *Rosenberger* was very different from the programs at issue in *Rust* and here. It was designed to encourage diverse private expression, and the Court held that the university had, in effect, created a limited public forum for such private expression. 515 U.S. at

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[13] A proper understanding of the Section 504(a)(16) proviso wholly undermines respondents' suggestion (99-603 Br. in Opp. 18-20) that the judgment below could be affirmed on separation-of-powers grounds. First, the proviso in no way interferes with a court's duty to interpret the Constitution. It does not authorize LSC attorneys to represent certain clients and then bar them from calling constitutional issues to the court's attention, as respondents would have it. *Id.* at 19. An LSC fund recipient is not authorized to represent that client at all. Second, the proviso does not mandate any rule of decision for courts. Individuals seeking welfare benefits by seeking to amend or challenge existing law are entitled to make any legal arguments they wish in support of their claim. They are not entitled, however, to have a federally funded attorney represent them in that litigation.

829-830; see *Finley*, 524 U.S. at 586; see also *id.* at 598-599 (Scalia, J., concurring) (noting that *Rosenberger* "found the viewpoint discrimination unconstitutional, not because funding of 'private' speech was involved, but because the government had established a limited public forum"); cf. *Board of Regents of the Univ. of Wis. Sys.* v. *Southworth*, 120 S. Ct. 1346, 1355 (2000) ("The speech the University seeks to encourage in the program before us is distinguished not by discernable limits but by its vast, unexplored bounds.").

The LSC program, by contrast, is not dedicated to the promotion of diverse private expression in a public forum; it exists to subsidize certain discrete legal representation before an agency or in court. See Pet. App. 49a-50a (Jacobs, J., dissenting in part). The Ninth Circuit made this clear in *Legal Aid Society of Hawaii* v. *Legal Services Corp.*, 145 F.3d 1017 (*LASH III*), cert. denied, 525 U.S. 1015 (1998), where the court (per Justice White, sitting by designation) expressly rejected the contention that *Rosenberger* undermines the validity of the LSC limitations. The court concluded that, unlike in *Rosenberger*, where the government expended funds to encourage a diversity of views from private speakers, but "[l]ike the Title X program in *Rust*, the LSC program is designed to provide professional services of limited scope to indigent persons, *not create a forum for the free expression of ideas.*" 145 F.3d at 1028 (emphasis supplied).

CONCLUSION

The judgment of the court of appeals should be reversed insofar as it holds unconstitutional the proviso in Section 504(a)(16).

Respectfully submitted.

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JUNE 2000

APPENDIX

1. The Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat 1321, 1321-50 to 1321-59, provides in relevant part:

TITLE V—RELATED AGENCIES

* * * * *

LEGAL SERVICES CORPORATION

PAYMENT TO THE LEGAL SERVICES CORPORATION

For payment to the Legal Services Corporation to carry out the purposes of the Legal Services Corporation Act of 1974, as amended, $278,000,000, of which $269,400,000 is for basic field programs and required independent audits carried out in accordance with section 509; $1,500,000 is for the Office of the Inspector General, of which such amounts as may be necessary may be used to conduct additional audits of recipients in accordance with section 509 of this Act; and $7,100,000 is for management and administration: *Provided*, That $198,750,000 of the total amount provided under this heading for basic field programs shall not be available except for the competitive award of grants and contracts under section 503 of this Act.

ADMINISTRATIVE PROVISIONS—LEGAL SERVICES CORPORATION

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SEC. 504. (a) None of the funds appropriated in this Act to the Legal Services Corporation may be used to

provide financial assistance to any person or entity (which may be referred to in this section as a "recipient")—

(1) that makes available any funds, personnel, or equipment for use in advocating or opposing any plan or proposal, or represents any party or participates in any other way in litigation, that is intended to or has the effect of altering, revising, or reapportioning a legislative, judicial, or elective district at any level of government, including influencing the timing or manner of the taking of a census;

(2) that attempts to influence the issuance, amendment, or revocation of any executive order, regulation, or other statement of general applicability and future effect by any Federal, State, or local agency;

(3) that attempts to influence any part of any adjudicatory proceeding of any Federal, State, or local agency if such part of the proceeding is designed for the formulation or modification of any agency policy of general applicability and future effect;

(4) that attempts to influence the passage or defeat of any legislation, constitutional amendment, referendum, initiative, or any similar procedure of the Congress or a State or local legislative body;

(5) that attempts to influence the conduct of oversight proceedings of the Corporation or any person or entity receiving financial assistance provided by the Corporation;

(6) that pays for any personal service, advertisement, telegram, telephone communication, letter, printed or written matter, administrative expense, or related expense, associated with an activity prohibited in this section;

(7) that initiates or participates in a class action suit;

(8) that files a complaint or otherwise initiates or participates in litigation against a defendant, or engages in a precomplaint settlement negotiation with a prospective defendant, unless—

(A) each plaintiff has been specifically identified, by name, in any complaint filed for purposes of such litigation or prior to the precomplaint settlement negotiation; and

(B) a statement or statements of facts written in English and, if necessary, in a language that the plaintiffs understand, that enumerate the particular facts known to the plaintiffs on which the complaint is based, have been signed by the plaintiffs, are kept on file by the recipient, and are made available to any Federal department or agency that is auditing or monitoring the activities of the Corporation or of the recipient, and to any auditor or monitor receiving Federal funds to conduct such auditing or monitoring, including any auditor or monitor of the Corporation: *Provided*, That upon establishment of reasonable cause that an injunction is necessary to prevent probable, serious harm to such potential plaintiff, a court of competent jurisdiction may enjoin the

disclosure of the identity of any potential plaintiff pending the outcome of such litigation or negotiations after notice and an opportunity for a hearing is provided to potential parties to the litigation or the negotiations: *Provided further*, That other parties to the litigation or negotiation shall have access to the statement of facts referred to in subparagraph (B) only through the discovery process after litigation has begun;

(9) unless—

(A) prior to the provision of financial assistance—

(i) if the person or entity is a nonprofit organization, the governing board of the person or entity has set specific priorities in writing, pursuant to section 1007(a)(2)(C)(i) of the Legal Services Corporation Act (42 U.S.C. 2996f(a)(2)(C)(i)), of the types of matters and cases to which the staff of the nonprofit organization shall devote time and resources; and

(ii) the staff of such person or entity has signed a written agreement not to undertake cases or matters other than in accordance with the specific priorities set by such governing board, except in emergency situations defined by such board and in accordance with the written procedures of such board for such situations; and

(B) the staff of such person or entity provides to the governing board on a quarterly basis, and to the Corporation on an annual basis, information on all cases or matters undertaken other than cases or matters undertaken in accordance with such priorities;

(10) unless—

(A) prior to receiving the financial assistance, such person or entity agrees to maintain records of time spent on each case or matter with respect to which the person or entity is engaged;

(B) any funds, including Interest on Lawyers Trust Account funds, received from a source other than the Corporation by the person or entity, and disbursements of such funds, are accounted for and reported as receipts and disbursements, respectively, separate and distinct from Corporation funds; and

(C) the person or entity agrees (notwithstanding section 1006(b)(3) of the Legal Services Corporation Act (42 U.S.C. 2996e(b)(3)) to make the records described in this paragraph available to any Federal department or agency that is auditing or monitoring the activities of the Corporation or of the recipient, and to any independent auditor or monitor receiving Federal funds to conduct such auditing or monitoring,

including any auditor or monitor of the Corporation;

(11) that provides legal assistance for or on behalf of any alien, unless the alien is present in the United States and is—

(A) an alien lawfully admitted for permanent residence as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20));

(B) an alien who—

(i) is married to a United States citizen or is a parent or an unmarried child under the age of 21 years of such a citizen; and

(ii) has filed an application to adjust the status of the alien to the status of a lawful permanent resident under the Immigration and Nationality Act (8 U.S.C. 1101 et seq.), which application has not been rejected;

(C) an alien who is lawfully present in the United States pursuant to an admission under section 207 of the Immigration and Nationality Act (8 U.S.C. 1157) (relating to refugee admission) or who has been granted asylum by the Attorney General under such Act;

(D) an alien who is lawfully present in the United States as a result of withholding of deportation by the Attorney General pursuant to

section 243(h) of the Immigration and Nationality Act (8 U.S.C. 1253(h));

(E) an alien to whom section 305 of the Immigration Reform and Control Act of 1986 (8 U.S.C. 1101 note) applies, but only to the extent that the legal assistance provided is the legal assistance described in such section; or

(F) an alien who is lawfully present in the United States as a result of being granted conditional entry to the United States before April 1, 1980, pursuant to section 203(a)(7) of the Immigration and Nationality Act (8 U.S.C. 1153(a)(7)), as in effect on March 31, 1980, because of persecution or fear of persecution on account of race, religion, or political calamity;

(12) that supports or conducts a training program for the purpose of advocating a particular public policy or encouraging a political activity, a labor or antilabor activity, a boycott, picketing, a strike, or a demonstration, including the dissemination of information about such a policy or activity, except that this paragraph shall not be construed to prohibit the provision of training to an attorney or a paralegal to prepare the attorney or paralegal to provide—

(A) adequate legal assistance to eligible clients; or

(B) advice to any eligible client as to the legal rights of the client;

(13) that claims (or whose employee claims), or collects and retains, attorneys' fees pursuant to any Federal or State law permitting or requiring the awarding of such fees;

(14) that participates in any litigation with respect to abortion;

(15) that participates in any litigation on behalf of a person incarcerated in a Federal, State, or local prison;

(16) that initiates legal representation or participates in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system, except that this paragraph shall not be construed to preclude a recipient from representing an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation;

(17) that defends a person in a proceeding to evict the person from a public housing project if—

(A) the person has been charged with the illegal sale or distribution of a controlled substance; and

(B) the eviction proceeding is brought by a public housing agency because the illegal drug activity of the person threatens the health or safety of another tenant residing in the public housing project or employee of the public housing agency;

(18) unless such person or entity agrees that the person or entity, and the employees of the person or entity, will not accept employment resulting from in-person unsolicited advice to a nonattorney that such nonattorney should obtain counsel or take legal action, and will not refer such nonattorney to another person or entity or an employee of the person or entity, that is receiving financial assistance provided by the Corporation; or

(19) unless such person or entity enters into a contractual agreement to be subject to all provisions of Federal law relating to the proper use of Federal funds, the violation of which shall render any grant or contractual agreement to provide funding null and void, and, for such purposes, the Corporation shall be considered to be a Federal agency and all funds provided by the Corporation shall be considered to be Federal funds provided by grant or contract.

(b) Nothing in this section shall be construed to prohibit a recipient from using funds from a source other than the Legal Services Corporation for the purpose of contacting, communicating with, or responding to a request from, a State or local government agency, a State or local legislative body or committee, or a member thereof, regarding funding for the recipient, including a pending or proposed legislative or agency proposal to fund such recipient.

(c) Not later than 30 days after the date of enactment of this Act, the Legal Services Corporation shall promulgate a suggested list of priorities that boards of directors may use in setting priorities under subsection (a)(9).

(d)(1) The Legal Services Corporation shall not accept any non-Federal funds, and no recipient shall accept funds from any source other than the Corporation, unless the Corporation or the recipient, as the case may be, notifies in writing the source of the funds that the funds may not be expended for any purpose prohibited by the Legal Services Corporation Act or this title.

(2) Paragraph (1) shall not prevent a recipient from—

(A) receiving Indian tribal funds (including funds from private nonprofit organizations for the benefit of Indians or Indian tribes) and expending the tribal funds in accordance with the specific purposes for which the tribal funds are provided; or

(B) using funds received from a source other than the Legal Services Corporation to provide legal assistance to a covered individual if such funds are used for the specific purposes for which such funds were received, except that such funds may not be expended by recipients for any purpose prohibited by this Act or by the Legal Services Corporation Act.

(e) Nothing in this section shall be construed to prohibit a recipient from using funds derived from a source other than the Legal Services Corporation to comment on public rulemaking or to respond to a written request for information or testimony from a Federal, State or local agency, legislative body or committee, or a member of such an agency, body, or committee, so long as the response is made only to the

parties that make the request and the recipient does not arrange for the request to be made.

(f) As used in this section:

(1) The term "controlled substance" has the meaning given the term in section 102 of the Controlled Substances Act (21 U.S.C. 802).

(2) The term "covered individual" means any person who—

(A) except as provided in subparagraph (B), meets the requirements of this Act and the Legal Services Corporation Act relating to eligibility for legal assistance; and

(B) may or may not be financially unable to afford legal assistance.

(3) The term "public housing project" has the meaning as used within, and the term "public housing agency" has the meaning given the term, in section 3 of the United States Housing Act of 1937 (42 U.S.C. 1437a).

SEC. 505. None of the funds appropriated in this Act to the Legal Services Corporation or provided by the Corporation to any entity or person may be used to pay membership dues to any private or nonprofit organization.

SEC. 506. None of the funds appropriated in this Act to the Legal Services Corporation may be used by any person or entity receiving financial assistance from the Corporation to file or pursue a lawsuit against the Corporation.

SEC. 507. None of the funds appropriated in this Act to the Legal Services Corporation may be used for any purpose prohibited or contrary to any of the provisions of authorization legislation for fiscal year 1996 for the Legal Services Corporation that is enacted into law. Upon the enactment of such Legal Services Corporation reauthorization legislation, funding provided in this Act shall from that date be subject to the provisions of that legislation and any provisions in this Act that are inconsistent with that legislation shall no longer have effect.

SEC. 508. (a) The requirements of section 504 shall apply to the activities of a recipient described in section 504, or an employee of such a recipient, during the provision of legal assistance for a case or matter, if the recipient or employee begins to provide the legal assistance on or after the date of enactment of this Act.

(b) If the recipient or employee began to provide legal assistance for the case or matter prior to the date of enactment of this Act—

(1) each of the requirements of section 504 (other than paragraphs (7), (11), (13), and (15) of subsection (a) of such section) shall, beginning on the date of enactment of this Act, apply to the activities of the recipient or employee during the provision of legal assistance for the case or matter;

(2) the requirements of paragraphs (7), (11), and (15) of section 504(a) shall apply—

(A) beginning on the date of enactment of this Act, to the activities of the recipient or employee during the provision of legal assis-

tance for any additional related claim for which the recipient or employee begins to provide legal assistance on or after such date; and

(B) beginning August 1, 1996, to all other activities of the recipient or employee during the provision of legal assistance for the case or matter; and

(3) the requirements of paragraph (13) of section 504(a)—

(A) shall apply beginning on the date of enactment of this Act to the activities of the recipient or employee during the provision of legal assistance for any additional related claim for which the recipient or employee begins to provide legal assistance on or after such date; and

(B) shall not apply to all other activities of the recipient or employee during the provision of legal assistance for the case or matter.

(c) The Legal Services Corporation shall, every 60 days, submit to the Committees on Appropriations of the Senate and House of Representatives a report setting forth the status of cases and matters referred to in subsection (b)(2).

SEC. 509. (a) An audit of each person or entity receiving financial assistance from the Legal Services Corporation under this Act (referred to in this section as a "recipient") shall be conducted in accordance with generally accepted government auditing standards and

guidance established by the Office of the Inspector General and shall report whether—

(1) the financial statements of the recipient present fairly its financial position and the results of its financial operations in accordance with generally accepted accounting principles;

(2) the recipient has internal control systems to provide reasonable assurance that it is managing funds, regardless of source, in compliance with Federal laws and regulations; and

(3) the recipient has complied with Federal laws and regulations applicable to funds received, regardless of source.

(b) In carrying out the requirements of subsection (a)(3), the auditor shall select and test a representative number of transactions and report all instances of noncompliance to the recipient. The recipient shall report in writing any noncompliance found by the auditor during the audit under this section within 5 business days to the Office of the Inspector General and shall provide a copy of the report simultaneously to the auditor. If the recipient fails to report the noncompliance, the auditor shall report the noncompliance directly to the Office of the Inspector General within 5 business days of the recipient's failure to report. The auditor shall not be liable in a private action for any finding, conclusion, or statement expressed in a report made pursuant to this section.

(c) The audits required under this section shall be provided for by the recipients and performed by independent public accountants. The cost of such audits

shall be shared on a pro rata basis among all of the recipient's funding providers and the appropriate share shall be an allowable charge to the Federal funds provided by the Legal Services Corporation. No audit costs may be charged to the Federal funds when the audit required by this section has not been made in accordance with the guidance promulgated by the Office of the Inspector General.

If the recipient fails to have an acceptable audit in accordance with the guidance promulgated by the Office of the Inspector General, the following sanctions shall be available to the Corporation as recommended by the Office of the Inspector General:

(1) The withholding of a percentage of the recipient's funding until the audit is completed satisfactorily.

(2) The suspension of recipient's funding until an acceptable audit is completed.

(d) The Office of the Inspector General may remove, suspend, or bar an independent public accountant, upon a showing of good cause, from performing audit services required by this section. Any such action to remove, suspend, or bar an auditor shall be only after notice to the auditor and an opportunity for hearing. The Office of the Inspector General shall develop and issue rules of practice to implement this paragraph.

(e) Any independent public accountant performing an audit under this section who subsequently ceases to be the accountant for the recipient shall promptly notify the Office of the Inspector General pursuant to such

rules as the Office of the Inspector General shall prescribe.

(f) Audits conducted in accordance with this section shall be in lieu of the financial audits otherwise required by section 1009(c) of the Legal Services Corporation Act (42 U.S.C. 2996h(c)).

(g) The Office of the Inspector General is authorized to conduct on-site monitoring, audits, and inspections in accordance with Federal standards.

(h) Notwithstanding section 1006(b)(3) of the Legal Services Corporation Act (42 U.S.C. 2996e(b)(3)), financial records, time records, retainer agreements, client trust fund and eligibility records, and client names, for each recipient shall be made available to any auditor or monitor of the recipient, including any Federal department or agency that is auditing or monitoring the activities of the Corporation or of the recipient, and any independent auditor or monitor receiving Federal funds to conduct such auditing or monitoring, including any auditor or monitor of the Corporation, except for reports or records subject to the attorney-client privilege.

(i) The Legal Services Corporation shall not disclose any name or document referred to in subsection (h), except to—

(1) a Federal, State, or local law enforcement official; or

(2) an official of an appropriate bar association for the purpose of enabling the official to conduct an investigation of a rule of professional conduct.

(j) The recipient management shall be responsible for expeditiously resolving all reported audit reportable conditions, findings, and recommendations, including those of sub-recipients.

(k) The Legal Services Corporation shall—

(1) follow up on significant reportable conditions, findings, and recommendations found by the independent public accountants and reported to Corporation management by the Office of the Inspector General to ensure that instances of deficiencies and noncompliance are resolved in a timely manner, and

(2) Develop procedures to ensure effective follow-up that meet at a minimum the requirements of Office of Management and Budget Circular Number A-50.

(*l*) The requirements of this section shall apply to a recipient for its first fiscal year beginning on or after January 1, 1996.

2. The Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat 3009, 3009-59 to 3009-60, provides in relevant part:

TITLE V—RELATED AGENCIES

* * * * *

LEGAL SERVICES CORPORATION

PAYMENT TO THE LEGAL SERVICES CORPORATION

For payment to the Legal Services Corporation to carry out the purposes of the Legal Services Corporation Act of 1974, as amended, $283,000,000, of which $274,400,000 is for basic field programs and required independent audits; $1,500,000 is for the Office of Inspector General, of which such amounts as may be necessary may be used to conduct additional audits of recipients; and $7,100,000 is for management and administration.

ADMINISTRATIVE PROVISIONS—LEGAL SERVICES CORPORATION

* * * * *

SEC. 502. (a) CONTINUATION OF REQUIREMENTS AND RESTRICTIONS.—None of the funds appropriated in this Act to the Legal Services Corporation shall be expended for any purpose prohibited or limited by, or contrary to any of the provisions of—

(1) sections 501, 502, 505, 506, and 507 of Public Law 104-134 (110 Stat. 1321-51 et seq.), and all funds appropriated in this Act to the Legal Services Corporation shall be subject to the same

terms and conditions as set forth in such sections, except that all references in such sections to 1995 and 1996 shall be deemed to refer instead to 1996 and 1997, respectively; and

(2) section 504 of Public Law 104-134 (110 Stat. 1321-53 et seq.), and all funds appropriated in this Act to the Legal Services Corporation shall be subject to the same terms and conditions set forth in such section, except that—

(A) subsection (c) of such section 504 shall not apply;

(B) paragraph (3) of section 508(b) of Public Law 104-134 (110 Stat. 1321-58) shall apply with respect to the requirements of subsection (a)(13) of such section 504, except that all references in such section 508(b) to the date of enactment shall be deemed to refer to April 26, 1996;

* * * * *

SEC. 503. (a) CONTINUATION OF AUDIT REQUIREMENTS.—The requirements of section 509 of Public Law 104-134 (110 Stat. 1321-58 et seq.), other than subsection (l) of such section, shall apply during fiscal year 1997.

(b) REQUIREMENT OF ANNUAL AUDIT.—An annual audit of each person or entity receiving financial assistance from the Legal Services Corporation under this Act shall be conducted during fiscal year 1997 in accordance with the requirements referred to in subsection (a).

3. The Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat 2440, 2510-2512, provides in relevant part:

TITLE V—RELATED AGENCIES

* * * * *

LEGAL SERVICES CORPORATION

PAYMENT TO THE LEGAL SERVICES CORPORATION

For payment to the Legal Services Corporation to carry out the purposes of the Legal Services Corporation Act of 1974, as amended, $283,000,000, of which $274,400,000 is for basic field programs and required independent audits; $1,500,000 is for the Office of Inspector General, of which such amounts as may be necessary may be used to conduct additional audits of recipients; and $7,100,000 is for management and administration.

ADMINISTRATIVE PROVISIONS—LEGAL SERVICES CORPORATION

* * * * *

SEC. 502. (a) CONTINUATION OF REQUIREMENTS AND RESTRICTIONS.—None of the funds appropriated in this Act to the Legal Services Corporation shall be expended for any purpose prohibited or limited by, or contrary to any of the provisions of—

(1) sections 501, 502, 505, 506, and 507 of Public Law 104-134 (110 Stat. 1321-51 et seq.), and all funds appropriated in this Act to the Legal

Services Corporation shall be subject to the same terms and conditions as set forth in such sections, except that all references in such sections to 1995 and 1996 shall be deemed to refer instead to 1997 and 1998, respectively; and

(2) section 504 of Public Law 104-134 (110 Stat. 1321-53 et seq.), and all funds appropriated in this Act to the Legal Services Corporation shall be subject to the same terms and conditions set forth in such section, except that—

(A) subsection (c) of such section 504 shall not apply;

(B) paragraph (3) of section 508(b) of Public Law 104-134 (110 Stat. 1321-58) shall apply with respect to the requirements of subsection (a)(13) of such section 504, except that all references in such section 508(b) to the date of enactment shall be deemed to refer to April 26, 1996;

* * * * *

SEC. 503. (a) CONTINUATION OF AUDIT REQUIREMENTS.—The requirements of section 509 of Public Law 104-134 (110 Stat. 1321-58 et seq.), other than subsection (l) of such section, shall apply during fiscal year 1998.

(b) REQUIREMENT OF ANNUAL AUDIT.—An annual audit of each person or entity receiving financial assistance from the Legal Services Corporation under this Act shall be conducted during fiscal year 1998 in

accordance with the requirements referred to in subsection (a).

SEC. 504. (a) DEBARMENT.—The Legal Services Corporation may debar a recipient, on a showing of good cause, from receiving an additional award of financial assistance from the Corporation. Any such action to debar a recipient shall be instituted after the Corporation provides notice and an opportunity for a hearing to the recipient.

(b) REGULATIONS.—The Legal Services Corporation shall promulgate regulations to implement this section.

(c) GOOD CAUSE.—In this section, the term "good cause", used with respect to debarment, includes—

(1) prior termination of the financial assistance of the recipient, under part 1640 of title 45, Code of Federal Regulations (or any similar corresponding regulation or ruling);

(2) prior termination in whole, under part 1606 of title 45, Code of Federal Regulations (or any similar corresponding regulation or ruling), of the most recent financial assistance received by the recipient, prior to date of the debarment decision;

(3) substantial violation by the recipient of the statutory or regulatory restrictions that prohibit recipients from using financial assistance made available by the Legal Services Corporation or other financial assistance for purposes prohibited under the Legal Services Corporation Act (42 U.S.C. 2996 et seq.) or for involvement in any

activity prohibited by, or inconsistent with, section 504 of Public Law 104-134 (110 Stat. 1321-53 et seq.), section 502(a)(2) of Public Law 104-208 (110 Stat. 3009-59 et seq.), or section 502(a)(2) of this Act;

(4) knowing entry by the recipient into a subgrant, subcontract, or other agreement with an entity that had been debarred by the Corporation; or

(5) the filing of a lawsuit by the recipient, on behalf of the recipient, as part of any program receiving any Federal funds, naming the Corporation, or any agency or employee of a Federal, State, or local government, as a defendant.

4. The Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat 2681, 2681-107, provides in relevant part:

TITLE V—RELATED AGENCIES

* * * * *

LEGAL SERVICES CORPORATION

PAYMENT TO THE LEGAL SERVICES CORPORATION

For payment to the Legal Services Corporation to carry out the purposes of the Legal Services Corporation Act of 1974, as amended, $300,000,000, of which $289,000,000 is for basic field programs and required independent audits; $2,015,000 is for the Office of Inspector General, of which such amounts as may be necessary may be used to conduct additional audits of recipients; and $8,985,000 is for management and administration.

ADMINISTRATIVE PROVISION—LEGAL SERVICES CORPORATION

None of the funds appropriated in this Act to the Legal Services Corporation shall be expended for any purpose prohibited or limited by, or contrary to any of the provisions of, sections 501, 502, 503, 504, 505, and 506 of Public Law 105-119, and all funds appropriated in this Act to the Legal Services Corporation shall be subject to the same terms and conditions set forth in such sections, except that all references in sections 502 and 503 to 1997 and 1998 shall be deemed to refer instead to 1998 and 1999, respectively.

5. The Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-49, provides in relevant part:

TITLE V—RELATED AGENCIES

* * * * *

LEGAL SERVICES CORPORATION

PAYMENT TO THE LEGAL SERVICES CORPORATION

For payment to the Legal Services Corporation to carry out the purposes of the Legal Services Corporation Act of 1974, as amended, $305,000,000, of which $289,000,000 is for basic field programs and required independent audits; $2,100,000 is for the Office of Inspector General, of which such amounts as may be necessary may be used to conduct additional audits of recipients; $8,900,000 is for management and administration; and $5,000,000 is for client self-help and information technology.

ADMINISTRATIVE PROVISION—LEGAL SERVICES CORPORATION

None of the funds appropriated in this Act to the Legal Services Corporation shall be expended for any purpose prohibited or limited by, or contrary to any of the provisions of, sections 501, 502, 503, 504, 505, and 506 of Public Law 105-119, and all funds appropriated in this Act to the Legal Services Corporation shall be subject to the same terms and conditions set forth in such sections, except that all references in sections 502 and 503 to 1997 and 1998 shall be deemed to refer instead to 1999 and 2000, respectively.

6. Section 1610.8 of Title 45 of the Code of Federal Regulations provides in relevant part:

PART 1610—USE OF NON-LSC FUNDS, TRANSFERS OF LSC FUNDS, PROGRAM INTEGRITY

* * * * *

§ 1610.8 Program integrity of recipient.

(a) A recipient must have objective integrity and independence from any organization that engages in restricted activities. A recipient will be found to have objective integrity and independence from such an organization if:

(1) The other organization is a legally separate entity;

(2) The other organization receives no transfer of LSC funds, and LSC funds do not subsidize restricted activities; and

(3) The recipient is physically and financially separate from the other organization. Mere bookkeeping separation of LSC funds from other funds is not sufficient. Whether sufficient physical and financial separation exists will be determined on a case-by-case basis and will be based on the totality of the facts. The presence or absence of any one or more factors will not be determinative. Factors relevant to this determination shall include but will not be limited to:

(i) The existence of separate personnel;

(ii) The existence of separate accounting and timekeeping records;

(iii) The degree of separation from facilities in which restricted activities occur, and the extent of such restricted activities; and

(iv) The extent to which signs and other forms of identification which distinguish the recipient from the organization are present.

(b) Each recipient's governing body must certify to the Corporation within 180 days of the effective date of this part that the recipient is in compliance with the requirements of this section. Thereafter, the recipient's governing body must certify such compliance to the Corporation on an annual basis.

7. Part 1639 of Title 45 of the Code of Federal Regulations provides in relevant part:

PART 1639—WELFARE REFORM

§ 1639.1 Purpose.

The purpose of this rule is to ensure that LSC recipients do not initiate litigation involving, or challenge or participate in, efforts to reform a Federal or State welfare system. The rule also clarifies when recipients may engage in representation on behalf of an individual client seeking specific relief from a welfare agency and under what circumstances recipients may use funds from sources other than the Corporation to comment on public rulemaking or respond to requests from legislative or administrative officials involving a reform of a Federal or State welfare system.

§ 1639.2 Definitions.

(a) *An effort to reform a Federal or State welfare system* includes all of the provisions, except for the Child Support Enforcement provisions of Title III, of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Personal Responsibility Act), 110 Stat. 2105 (1996), and subsequent legislation enacted by Congress or the States to implement, replace or modify key components of the provisions of the Personal Responsibility Act or by States to replace or modify key components of their General Assistance or similar means-tested programs conducted by States or by counties with State funding or under State mandates.

(b) *Existing law* as used in this part means Federal, State or local statutory laws or ordinances which are

enacted as an effort to reform a Federal or State welfare system and regulations issued pursuant thereto that have been formally promulgated pursuant to public notice and comment procedures.

§ 1639.3 Prohibition.

Except as provided in §§ 1639.4 and 1639.5, recipients may not initiate legal representation, or participate in any other way in litigation, lobbying or rulemaking, involving an effort to reform a Federal or State welfare system. Prohibited activities include participation in:

(a) Litigation challenging laws or regulations enacted as part of an effort to reform a Federal or State welfare system.

(b) Rulemaking involving proposals that are being considered to implement an effort to reform a Federal or State welfare system.

(c) Lobbying before legislative or administrative bodies undertaken directly or through grassroots efforts involving pending or proposed legislation that is part of an effort to reform a Federal or State welfare system.

§ 1639.4 Permissible representation of eligible clients.

Recipients may represent an individual eligible client who is seeking specific relief from a welfare agency, if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation.

§ 1639.5 Exceptions for public rulemaking and responding to requests with non-LSC funds.

Consistent with the provisions of 45 CFR 1612.6 (a) through (e), recipients may use non-LSC funds to comment in a public rulemaking proceeding or respond to a written request for information or testimony from a Federal, State or local agency, legislative body, or committee, or a member thereof, regarding an effort to reform a Federal or State welfare system.

§ 1639.6 Recipient policies and procedures.

Each recipient shall adopt written policies and procedures to guide its staff in complying with this part.

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